No. 22237

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

J. Bryant Kasey and MaryAnn Kasey,
Appellants,

vs.

Molybdenum Corporation of America, a corporation,
Appellee.

Appeal From the United States District Court for the Central District of California.

BRIEF OF APPELLEE.

Schultheis, Laybourne & Dowds,
Everett B. Laybourne,
Dennis Keeley,
621 South Spring Street,
Los Angeles, Calif. 90014,
Attorneys for Appellee.

Parker & Son, Inc., Law Printers, Los Angeles. Phone MA. 6-9171.

TOPICAL INDEX

Page

Page

TABLE OF AUTHORITIES CITED

Cases — Page

Rules

Statutes

No. 22237

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

J. Bryant Kasey and MaryAnn Kasey,

Appellants,

vs.

Molybdenum Corporation of America, a corporation,

Appellee.

Appeal From the United States District Court for the Central District of California.

BRIEF OF APPELLEE.

Statement of the Case.

By order dated February 2, 1967, Honorable Jessie W. Curtis, Judge of the United States District Court for the Central District of California, denied appellants' motion to change the venue of their action to the United States District Court in Nevada. [R. pp. 13-14.]

Such motion was filed nearly eight years after the action had been initiated. During that time there had been two appeals, one attempted appeal and two petitions to this Court, and a number of issues had been separately tried and adjudicated pursuant to Rule 54(b). A few issues are still remaining for trial.

(b) is not available in such case and that review must be effected by application for mandamus. *A. Olinck & Sons v. Dempster Bros., Inc.,* 365 F. 2d 439, 442 (2d Cir. 1966); *Standard v. Stoll Packing Corporation,* 315 F. 2d 626 (3d Cir. 1963); *Bufalino v. Kennedy,* 273 F. 2d 71 (6th Cir. 1959). The view of the Fifth Circuit is to the contrary. *Humble Oil & Refining Company v. Bell Marine Service, Inc.,* 321 F. 2d 53 (5th Cir. 1963).

2. As an Application for Mandamus, This Proceeding Must Fail for Want of Extraordinary Circumstances.

Even if there had been some abuse of discretion or other error in the order of the District Court, the drastic remedy of mandamus would not be warranted.

In *Gulf Research & Development Co. v. Harrison,* 185 F. 2d 457 (9th Cir. 1950); aff'd in 344 U.S. 861, 73 S. Ct. 103, 97 L. Ed. 668 (1952) this Court denied a petition for mandamus wherein the petitioner sought to prevent transfer of the case to a different district. In denying such petition, Judge Orr emphasized that only extraordinary circumstances would warrant such relief.

> "We are of the opinion that once a suitor has properly invoked federal jurisdiction in this circuit it is within our power, in extraordinary circumstances, to issue mandamus to prevent a grave miscarriage of justice." *Gulf Research & Development Co. v. Harrison, supra,* at page 459.
>
> "The remedy of appeal from a final judgment is 'inadequate' so as to justify the use of mandamus only when it is totally unavailable, or when, because of the particular circumstances, it could

not correct extraordinary hardship." *Gulf Research & Development Co. v. Harrison, supra,* at page 460.

Appellants have pointed to no circumstances which would justify the extraordinary remedy of mandamus. (See discussion on pages 9 and 14, *infra.*) Impatient as they may be for a review of the order of the District Court, appellants have been unable to advance any reason why they should be excused from the rule imposed upon other litigants, that review of an interlocutory order must await entry of final judgment.

* * * * *

Because this proceeding cannot be properly entertained by the Court of Appeals, either as an interlocutory appeal or an application for mandamus, such proceeding should be dismissed.

II.

EVEN IF THE ORDER DENYING CHANGE OF VENUE WERE TO BE REVIEWED BY THIS COURT, SUCH ORDER WAS FREE OF ERROR AND SHOULD BE AFFIRMED.

The statute upon which appellants predicated their motion is 28 U.S.C. Section 1404(a). (Appellants' Op. Br. p. 3, lines 2-4.) Such section provides:

> "(a) For the convenience of parties and witnesses, in the interest of justice, a district court may transfer any civil action to any other district or division where it might have been brought."

Denial of the motion was based primarily upon the ground that the statute does not authorize a change of venue in this particular case. Because it goes to the heart of the matter, this point will receive appellee's first attention herein.

1. Since This Action Could Not Have Been Brought Initially in the District of Nevada, It May Not Be Properly Transferred to That District.

A District Court may transfer a civil action only to a ". . . district or division *where it might have been brought.*" 28 U.S.C. 1404(a). (Emphasis supplied.)

In denying appellants' motion for a change of venue, the District Court stated as its first ground for such decision:

> "1. It does not appear that this action could have been instituted in the District of Nevada;" [R. p. 13, lines 26-27.]

(a) Recovery of Possession of Real Property Situated in California Is One of the Claims Asserted in This Action.

One of plaintiffs' causes of action seeks recovery of title to and possession of certain mining claims near Mountain Pass, County of San Bernardino, California. [R. p. 4, lines 6-7, 25-26.] Such issue was duly tried and pursuant to Rule 54(b) of the Federal Rules of Civil Procedure, on March 13, 1963, it was adjudicated that recovery of such claims was barred by California Code of Civil Procedure Section 318. Upon appeal from such judgment, the same was affirmed by this Court in *Kasey v. Molybdenum Corporation of America,* 336 F. 2d 560 (9th Cir. 1964).

The mining claims which appellants sought to recover in the instant action were found by the District Court to be real property. Such determination was confirmed by this Court, which stated in its opinion:

> ". . . we hold that the district court was not in error in assuming that the mining claims, mill-

> sites, and appurtenances and improvements thereto are real property within the meaning of Sections 318 and 17 of the California Code of Civil Procedure." *Kasey v. Molybdenum Corporation of America, supra,* at page 565.

Accordingly, there is no question that one purpose of the present action concerned recovery of title to and possession of real property and that such property is located in California.

(b) An Action to Recover Possession of California Real Property Must Be Brought in California.

A local or *in rem* action in the Federal Court, predicated as in this case upon diversity of citizenship, must be brought in the district where the property is located. Such a requirement has been held to be not merely a question of venue but one which goes to the very jurisdiction of the court. *Livingston v. Jefferson,* 15 Fed. Cas. 660, No. 8411 (C.C.D. Va. 1811); *Ellenwood v. Marietta Chair Co.,* 158 U.S. 105, 15 S. Ct. 711, 39 L. Ed. 913 (1895); *Pasos v. Pan American Airways, Inc.,* 229 F. 2d 271 (2d Cir. 1956).

The Supreme Court has stated the rule most succinctly:

> ". . . an action for trespass upon land, like an action to recover the title or possession of the land itself, is a local action, and can only be brought within the state in which the land lies." *Ellenwood v. Marietta Chair Co., supra,* 158 U.S. 105 at page 107.

The preliminary question of whether an action is local or transitory is determined by state law. *Josevig-Kennecott Copper Co. v. James F. Howarth Co.,* 261

Fed. 567, 569 (9th Cir. 1919); *Erwin v. Barrow,* 217 F. 2d 522 (10th Cir. 1954).

In California an action to recover real property is local in nature and such fact *goes to the jurisdiction* of the state courts:

> "An absolute right is conferred by the Constitution, Article VI, section 5, which provides that all actions for the recovery of possession of, quieting title to, or for the enforcement of liens upon real estate, shall be 'commenced' in the county in which the real estate, or any part thereof, affected by such actions is situated." *Brock v. Superior Court,* 29 Cal. 2d 629, 633; 177 P. 2d 273 (1947).

A motion to transfer a local or *in rem* action to a district other than that in which the subject matter was located was held to have been properly denied in *Clinton Foods v. U.S.,* 188 F. 2d 289, 292 (4th Cir. 1951).

As the mining claims which appellants sought to recover are situated within the jurisdiction of the District Court for the Central District of California, it follows that selection of that particular forum was *mandatory as a matter of jurisdiction.*

(c) The Fact That the Recovery of Possession of Real Property Is No Longer an Issue in This Action Does Not Permit a Change of Venue; the Determination of Permissible Venue Depends Upon the Facts as They Existed at the Commencement of the Action.

Prior to the time appellants filed their motion for change of venue, it had been adjudicated that they could not recover possession of the mining claims which are the subject of this action. *Kasey v. Molybdenum,*

336 F. 2d 560 (9th Cir. 1964). Regardless of such disposition of the real property issue, Section 1404(a) permits transfer of an action only to a district where "it might have been brought" and such limitation is applied to the facts *as they existed at the time the action was filed.*

An action may not be transferred to a district which would not have been a proper venue for the action at the time of its commencement. Such was the clear and unmistakable holding in *Hoffman v. Blaski,* 363 U.S. 335, 80 S. Ct. 1084, 4 L. Ed. 2d 1254 (1960).

And since the District Court of Nevada would have been *without jurisdiction* had the action been filed therein, *a fortiori* the case may not be transferred to such Court at this time.

Appellants have stated no facts and have cited no authority in support of a different conclusion, nor have they suggested any possible error in the trial Court's determination that: "It does not appear that this action could have been instituted in the District of Nevada." It follows that the order sought to be reviewed is without error.

2. There Is No Showing That Transfer of the Action Would Serve the Interest of Justice.

Quite apart from the fact that the instant action cannot properly be transferred to a district in which it might not "have been brought", there has also been no showing which would justify a change of venue even if such action were legally possible.

28 U.S.C. Section 1404(a) provides that under certain circumstances an action may, "in the interest of justice", be transferred to another division or district

and that ". . . *the convenience of parties and witnesses* . . ." may be taken into account in determining the interest of justice.

(a) Appellants Admit That They Do Not Seek a Change of Venue for the Convenience of Witnesses or Because of the Situs of the Subject Matter of the Action.

Convenience of witnesses and situs of the subject matter of the action (in this case, the subject land is situated more closely to Las Vegas than to Los Angeles) are among the factors frequently considered in determining whether or not a change of venue would be in the interest of justice. The appellants admit that they do not seek a change of venue for either of such reasons. "No witnesses are involved in this action; nor is the subject matter of the litigation." (Appellants' Op. Br. p. 7, lines 6-7.)

While appellants are not competent to speak for appellee in stating that there are "no witnesses", such admission, together with their statement that "the subject matter of the litigation" is not involved, remove from consideration two of the often important grounds for a change of venue.

(b) The Fact That Appellants Have Moved Their Residence From California to Nevada Subsequent to Filing Their Action Does Not Justify a Change of Venue.

It was the appellants themselves who selected the present forum. Having subsequently moved to another state, they now seek to take this litigation along with them as if it were another household chattel, requesting a change of venue for their own personal convenience and citing the following reasons, among others:

(a) "travel of about 600 miles to and from their home",

(b) "traffic congestion on the Los Angeles end of the San Bernardino Freeway",

(c) "sleeping quarters are not always obtained",

(d) "nor is a parking place generally available within reasonable walking distance of this court", and

(e) "atmospheric conditions in Los Angeles are unbearable much of the time". [R. p. 8, lines 31-32; p. 9, lines 1-4.]

While appellants' personal convenience would no doubt be accommodated by transfer of the litigation to Las Vegas, the reasons proffered do not constitute, individually or collectively, a legally sufficient ground for change of venue. Certainly the ends of justice are not served by removal of a long protracted and complicated case from one forum to another in order to provide a less congested environment and a more acceptable standard of air purity, particularly at the instance of parties who initially selected the forum.

(c) A Change of Venue at This Time Would Result in Unnecessary Delay and Would Impose Additional Expenses and Burdens on Others Without Promoting the Interest of Justice.

The appellants filed the instant action on April 8, 1959. (Appellants' Op. Br. p. 1, lines 24-25.) In the ensuing period of nearly nine years, extensive pleadings have been filed and numerous hearings have been held concerning various complex questions of procedural and substantive law. This Court alone has had occasion to consider five separate petitions or appeals in addition to that before it now:

(1) On November 30, 1959 this Court granted an order allowing an interlocutory appeal pursuant to 28

U.S.C. 1292(b); such order was vacated on June 9, 1960. *Molybdenum Corporation of America v. J. Bryant Kasey, MaryAnn Kasey and Julius A. Paskan,* No. 16691.

(2) On May 7, 1963 an attempted appeal from an order denying leave to file an amended complaint was dismissed. *J. Bryant Kasey, et ux. v. Molybdenum Corporation of America,* No. 18626.

(3) An appeal taken from a partial judgment entered pursuant to Rule 54(b) was affirmed on August 28, 1964. *Kasey v. Molybdenum Corporation of America,* 336 F. 2d 560 (9th Cir. 1964).

(4) A petition for rehearing in respect to said decision of August 28, 1964 was denied on October 5, 1964. *J. Bryant Kasey, etc. v. Molybdenum Corporation of America,* No. 18695.

(5) A motion directed to this Court to vacate said judgment of August 28, 1964 was denied on September 21, 1965. *J. Bryant Kasey, etc. v. Molybdenum Corporation of America,* No. 18695.

Were this action to be transferred, the suceeding District Court judge would have to become familiar with an unusually lengthy and complex record which has accumulated over a period of nine years, a task necessarily imposing substantial additional delay and an unnecessary burden upon the judiciary, all to the *detriment* of the public interest. Moreover, such transfer would require employment of local counsel in Nevada, with consequent material added expense for appellee.

(d) There Is No Support for Appellants' Contention That the District Court Abused Its Discretion in Denying Their Motion for Change of Venue.

While appellants' make the conclusionary allegation that the District Court's denial of their motion for change of venue was "an abuse of discretion" (Appellants' Op. Br. p. 3, lines 1-2), they suggest no specific reasons, evidence or argument in support of such assertion.

As a matter of fact, the Court's ruling was in full conformity with established doctrine that once a plaintiff has chosen his forum, as the appellant's have done here, the law imposes a very heavy burden upon him if he thereafter attempts to change the venue of his action. Implicit in such holdings is the fact that the personal comfort and convenience of the plaintiff, the grounds advanced by the appellants for transfer, do not warrant a change of venue.

With one exception, every case cited by the appellants in support of their argument concerns a motion for change of venue made by the defendant and not by the plaintiff.

Much more to the point are such decisions as *Huisman v. Geuder, Paeschke & Frey Co.,* D.C. Wis. 1966, 250 F. Supp. 631, in which the *plaintiff,* as in the instant case, sought a change of venue to the district in which he resided. It was held that such showing was insufficient of itself to require transfer of the action to that district, *particularly when plaintiff has already chosen a different forum.*

The forum selected by the plaintiff as an appropriate one, in this case the U.S. District Court in Los Angeles, may not be lightly disregarded. *Axe-Houghton Fund A, Inc. v. Atlantic Research Corp.,* D.C. N.Y. 1964, 227 F. Supp. 521.

And even more important, the grounds which sometimes do justify a change of venue, the convenience of parties, the convenience of witnesses and the situs of the subject matter of the action are not present here. On the contrary, appellants argue that irrespective of the delay and expense to others, the present action is subject to transfer for the reason it would be less of a burden for them. Such contention ignores the additional burdens of time and expense which would necessarily be placed upon the Courts as well as upon the other party to the action.

It follows that the District Court was correct in concluding: "It does not appear that under the circumstances shown such a change of venue would be in the interest of justice." [R. p. 13, lines 28-30.]

3. The Claim of Bias Asserted by the Appellants Has No Foundation Whatsoever.

The appellants have displayed unusual bitterness towards both Court and counsel because of their disappointment in the judgment that the statute of limitations barred their recovery of the mining claims which are the subject of this action.

> "Of primary importance to appellants, which prompts them for a change of venue, amongst other reasons, is the policy of Judge Curtis to disregard predecessory facts before conclusions are drawn and the applicable law invoked. This was

the case in the trial of appellee's second defense in the piecemeal trial of issues in case No. 319-59-JWC Appeal No. 18695 reviewed by this court." (Appellant's Op. Br. p. 3, lines 15-20.)

Nor is their spleen vented solely upon the District Court:

"The Ninth Circuit Court of Appeals affirmed this nefarious and illegal judgment, a judgment and affirmation which plaintiff-appellants do not accept as binding in any sense whatsoever." (Appellants' Op. Br. p. 5, lines 17-19.)

The fact is that Judge Curtis' decision was affirmed by this Court (336 F. 2d 560) only after lengthy and painstaking consideration. Appellants have been accorded full courtesy and consideration at every judicial level and determinations contrary to their own position do not establish bias against them.

In the absence of even a scintilla of evidence of bias or prejudice, it may be assumed that appellants seek a change of venue not out of concern for the convenience of parties or witnesses, or the interest of justice, but rather in the hope for a new forum in which to attempt to re-litigate matters already decided against them.

This conclusion is confirmed by appellant's admission that

". . . the action should be transferred to a forum which will take cognizance of these facts and law relative thereto in the interest of justice. . . ." (Appellants' Statement of Points, p. 2, lines 23-25.)

Conclusion.

This application for review should be dismissed:

(a) The order is interlocutory in character; it is not a final judgment.

(b) The particular requirements of a discretionary appeal have not been met.

(c) There is no extraordinary circumstance which would warrant the remedy of mandamus.

Even if the order were properly before this Court, the action of the District Court should be affirmed:

(1) The action is one for recovery of California real property.

(2) Such action could only have been brought in California.

(3) Venue can be changed only to districts where the action "might have been brought."

(4) This particular action could not have been brought in Nevada.

(5) Thus transfer of the action to Nevada would not be lawfully authorized.

(6) Even if such transfer were legally possible, it would not be in the interest of justice.

(7) Adverse judicial determinations do not establish bias or prejudice.

Respectfully submitted,

SCHULTHEIS, LAYBOURNE & DOWDS,
EVERETT B. LAYBOURNE,
DENNIS KEELEY,
Attorneys for Appellee.

Certificate of Counsel.

I certify that, in connection with the preparation of this brief, I have examined Rules 18, 19 and 39 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

DENNIS KEELEY